Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-253

LOREN BERGH, Petitioner,

v.

STATE OF WASHINGTON; THOR TOLLEFSON, DIRECTOR OF THE WASHINGTON STATE DEPARTMENT OF FISHERIES; WASHINGTON STATE DEPARTMENT OF FISHERIES; EDGAR SCOFIELD and GEORGE BOLDT, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

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v.

STATE OF WASHINGTON; THOR TOLLEFSON, DIRECTOR OF THE WASHINGTON STATE DEPARTMENT OF FISHERIES; WASHINGTON STATE DEPARTMENT OF FISHERIES; EDGAR SCOFIELD and GEORGE BOLDT, Respondents.

Petition for Writ of Certiorari
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner, Loren Bergh, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this cause on May 3, 1976, and upon which rehearing was denied May 27, 1976.

OPINION BELOW

The opinion of the Court of Appeals presently unreported is reproduced in the appendix to the petition at pages 25 to

28. The order of the Court of Appeals denying rehearing is reproduced at page 24 of the appendix. The District Court did not file an opinion but, rather, entered an order and summary judgment reproduced in the appendix at page 23. A conflicting Washington State Supreme Court opinion, in a case in which petitioner was not a party, *Department of Game v. Puyallup Tribe, Inc.*, is reproduced in the appendix, pages 33 to 68, as reported, 86 Wn.2d 664, 548 P.2d 1058 (1976).

JURISDICTION

Jurisdiction for this court to review, by writ of certiorari, the judgment of the Court of Appeals entered May 3, 1976, and made final by the denial of the petition for rehearing per an order dated May 27, 1976, is conferred and pursuant to 28 U.S.C., § 1254(1).

QUESTIONS PRESENTED

1. Does collateral estoppel from *United States v. Washington* (No. 9213) bar petitioner from seeking and obtaining injunctive relief in this action against the selective adoption and enforcement of fishing regulations by the State of Washington and the Washington State Department of Fisheries which discriminate aginst petitioner as a commercial fisherman solely because he lacks a requisite race, creed, color or ancestry?

2. Does the Fourth Article, the Fourteenth Amendment to the United States Constitution or 42 U.S.C., § 1983 prohibit a policy of selective adoption and enforcement of state commercial

fishing regulations against petitioner but not against other citizens, when the discriminatory basis is solely that petitioner lacks a requisite race, creed, color or ancestry?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Article IV:

> Section 2. The Citizens of each State shall be entitled to all privileges and Immunities of Citizens in the several states.

United States Constitution, Amendment XIV:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities or citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C., § 1983:

> Civil action for deprivation of Rights.
> Every person who under color of any statute, ordinance, regulation,

custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Nature of the Action

Petitioner, a commercial gillnet fisherman for nineteen years, sought to enjoin the application of fishing regulations against him by the State of Washington when that application was discriminatory *solely* upon the basis that he lacked a requisite Indian race, creed or ancestry.

The State of Washington responded that they were compelled to do so by orders of the Honorable George Boldt, United States District Court Judge, which orders were filed by Edgar Scofield, Clerk of the United States District Court for the Western District of Washington in cause No. 9213.

Petitioner Bergh was not a party, nor privie to a party, involved in cause No. 9213 and argued that the State of Washington was violating his Fourth Article and Fourteenth Amendment rights under the United States Constitution and, also, 42 U.S.C., § 1983.

Proceedings in the District Court

Petitioner filed a verified complaint

and moved for summary judgment supported by various affidavits. The State of Washington, George Boldt and Edgar Scofield moved to dismiss on the record at that point. The petitioner's factual record is unchallenged and shows that the State of Washington was obeying George Boldt's orders and was discriminating against petitioner Bergh in adopting and enforcing fishing regulations solely on a basis that Bergh lacked a requisite Indian race, creed or ancestry. The record also shows Bergh was not a privie or party to cause No. 9213 and that in that cause Judge Boldt denied intervention to other fishermen similarly situated and that the equal protection argument had not been raised and decided there.

The District Court, the Honorable Donald Voorhees, granted summary judgment against petitioner dismissing his case without opinion, but in order indicated the basis was collateral estoppel from cause No. 9213.

Proceedings in the Court of Appeals

The Court of Appeals also refused to reach the merits holding that Judge Voorhees was within his discretion, because Judge Boldt's case was one of continuing jurisdiction. Nothing in the opinion mentioned that Judge Boldt had in all instances denied intervention to persons similarly situated to petitioner and that no party in Judge Boldt's court had or would raise the "equal protection" argument.

Separate Proceedings in the Washington State Supreme Court

On remand from the United States

Supreme Court, the Supreme Court of the State of Washington in *Department of Game v. Puyallup Tribe, Inc.*, 86 Wn.2d 664, 548 P.2d 1058 (1976), ruled that the equal protection argument is applicable to a person who is in petitioner Bergh's situation and held as law what petitioner Bergh urges here and urged to both the Ninth Circuit and the District Court. That opinion, reproduced in the appendix at pages 33 to 68, was held in abeyance pending review in this court upon that case.

Reasons for Granting the Writ

This case is the focus of a dispute between the federal court system which refuses to reach the "equal protection" theory on Indian fishing rights and the Washington state court system, which has recently decided that the "equal protection" argument is squarely applicable and proscribes fishing regulations which disfavor White fishermen solely because they lack a requisite race, creed or ancestry.

This court should grant review, because this case clearly raised the issue unencumbered by competing questions or vagueness in the record and is the sole case which has traveled the federal side on the equal protection argument.

If the court wishes review, it can summarily consider the meritorious issue on equal protection, *infra*, at point 2. However, the collateral estoppel issue used by the federal courts to avoid the merits are presented as point 1, *infra*.

1. *Does collateral estoppel from* United States v. Washington

(No. 9213) bar petitioner from seeking and obtaining injunctive relief in this action against the selective adoption and enforcement of fishing regulations by the State of Washington and the Washington State Department of Fisheries which discriminate against petitioner as a commercial fisherman solely because he lacks a requisite race, creed, color or ancestry?

There is no collateral estoppel working against petitioner Loren Bergh which precludes a decision upon the merits because:

a. Mr. Bergh was not a party to, or associated with any party to the Boldt decision in No. 9213 and Judge Boldt consistently has denied intervention to persons similarly situated;

b. the issues raised here were not raised or adjudicated in fact in the Boldt decision;

c. the issues raised here could not have been adjudicated in the Boldt decision because the prayer for declaratory decision did not seek such discriminatory use of state law and regulation and the cause of action arose subsequent to the Decision I therein;

d. George Boldt himself is a participant and a named defendant, and it is prejudicial to allow him to decide his own case.

However, the collateral estoppel point may be moot because the record is undisputed and sufficient that this court

can make a decision upon the merits. On the merits *commercial* fishing is a constitutional protected common occupation of the community and all actions of the defendant are subject to constitutional prohibitions of Article IV and Amendment XIV and 42 U.S.C., § 1983. The state has plenary power to regulate all persons as to commercial fishing for the general society and must do so without discrimination or denial of the equal protection of the law to all citizens. Plaintiff and the Indians at issue here are citizens and distinguishable solely upon the basis of race, creed, color or ancestry. Any person who discriminates on this basis breaks the law and should be enjoined.

Generally, for res judicata or collateral estoppel to occur, the federal textbook case of *United States v. United Airlines*, 216 F. Supp. 709, at 725-726 (D.C. WA NA, 1962) states that there must be a concurrent mutual identity in three areas:

a. in the relief sought on which final judgment was entered and adjudicated;

b. in the parties or their privies;

c. in the issues litigated.

(1) *Mutuality of Relief Sought on Which Final Judgment was Entered*

Nothing in the case of *United States v. State of Washington* (No. 9213) contemplated and no party prayed specifically prior to the entry of Final Decision No. 1 therein that the laws and regulations of the State of Washington be applied in a racially (*supra*-legislative) fiat. For

example, if Judge Boldt issued a mandamus to the Washington State Legislature and the governor is to appropriate monies to enforce these regulations, it would not be a collateral attack upon the decision to challenge this order by a direct independent suit. It wouldn't be fair to regulate them solely to an appeal process because no trial foundation exists as to test the act and, in addition, it would then be colored by the inherent prejudice of the actor deciding his own case.

(2) *Mutuality in the Parties and their Privies*

It is an undisputed fact in the record that Mr. Bergh was not a party to, represented in, or associated with any party to *United States v. State of Washington* (No. 9213). He never had his day in court nor his right to appeal under that cause of action; nor did he seek it, because discriminatory use of state laws and regulations was not within the contemplation of that suit. In addition, it is doubtful that Judge Boldt would have granted intervention, as he denied it to several commercial and sports fishing groups.

Thus, when the District Court judge refused to issue a decision upon the merits of Mr. Bergh's cause of action, it precluded Mr. Bergh from having his day in court on the merits. The very essence of the mutuality of parties criteria in estoppel is to assure due process for every citizen seeking redress for acts against him which he alleges are illegal; the very meaning of the word estoppel refers to past acts of the asserting actor. Mr. Bergh had no past

acts contradicting his instant allegation.

(3) *Mutuality in the Issues Litigated*

The record in this case conceded that the issue of subsequent discriminatory *supra*-legislative use of state law and regulation was not litigated in *United States v. Washington* (No. 9213).

In addition, precedent indicates that unconstitutional enforcement of a prior court decision creates a subsequent separate and independent cause of action not barred by collateral estoppel even among the same and identical litigants:

> Nor is there any merit in the respondent's contention that the opinion and judgment of the Supreme Court of Washington in the Moses Lake Case, 51 W2d 285, 317 P2d 1069, supra, is res judicata of the County's tax claims against the Moses Lake leasehold for at least the years 1955 and 1956. This is so because no tax whatever had then been assessed and levied against the Moses Lake leasehold, and hence no issue of discrimination was or could have been presented and adjudicated in that case
>
> Inasmuch as the taxes, presently assessed and levied, discriminate unconstitutionally against the

> United States and its lessees, they are void, and hence may not be exacted.
>
> Reversed.

Moses Lake Homes v. Grant County, 365 U.S. 744, 81 S. Ct. 870 (1961).

A District Court case in Mr. Bergh's favor is *United States v. 111.2 Acres of Land in Ferry County, Washington*, 293 F. Supp. 1042 (1968), at 1049; there it was held that a prior decision involving the constitutionality of a state statute did not collaterally estop a second independent suit challenging its constitutionality under a different article:

> The government contends the State is estopped from contesting the unconstitutionality of RCW 90.40.050 under the judgment entered in United States vs. Anderson, 109 F. Supp. 755 (E.D. Wash. 1953). The state was a party to that case, but was enjoined only to argue the unconstitutionality of RCW 90.40.050, occupying the position of amicus curiae. The State could not appeal Judge Driver's decision. Therefore his decision is not conclusive against the State. Restatement, Judgments §69(2) (1942).
>
> The question of law determined in United States vs. Anderson, was whether RCW 90.40.050 conflicted with

> Article II, section 19 of the Washington Constitution. . . . The conflict was not raised. As the question of law now before the court was not "actually litigated and determined" in the former adjudication, that adjudication is not conclusive upon the State.

Therefore, petitioner submits that collateral estoppel does not apply here to proscribe reaching a decision upon the merits of the equal protection issue.

2. *Does the Fourth Article, the Fourteenth Amendment of the United States Constitution, or 42 U.S.C., § 1983, prohibit a policy of selective adoption and enforcement of state commercial fishing regulations against petitioner but not against other citizens when the discriminatory basis is solely that petitioner lacks a requisite race, creed, color or ancestry?*

There was illegal discrimination against petitioner Bergh solely because he lacks a requisite race, creed, national origin or ancestry such that he was denied the privileges, immunities and equal protection of the law afforded other citizens in pursuit of his right to engage in a common occupation of his

of his community.

More than sixty years ago this Supreme Court in *Truax v. Raich*, 239 U.S. 33, at 41, said:

> It requires no argument to show that the right to work for a living in a common occupation of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the amendment to secure. . . . If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of equal protection of the laws would be a barren form of words.

Commercial fishing was brought within the "common occupation" definition of *Truax* as a constitutionally protected *right* by Justice Vinson speaking in *Toomer v. Witsell*, 334 U.S. 385, at 403:

> Thus we hold that commercial shrimping in the marginal sea, like other common callings, is within the purview of the privileges and immunities clause.

The United States Constitution, Amendment Article XIV, is very plain and clear in its mandate:

> No state shall make or enforce any law which shall abridge the privilege or immunities or citizens of the

United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The United States Constitution, Article IV, reads:

> The citizens of each state shall be entitled to all of the privileges and immunities of citizens in the several states.

An identical case of ethnic discrimination in commercial fishing was heard by this United States Supreme Court in 1948 in which the Fourteenth Amendment issue was considered. *Takahashi v. Fish Commission*, 334 U.S. 410, 98 L. Ed. 1498. In *Takahashi* the California legislature passed a statute precluding all persons not eligible for citizenship from obtaining a commercial fishing license. The law was racist, because the real goal of the statute was the exclusion of fishermen of Japanese ancestry. Justice Black answered the issue solely upon a Fourteenth Amendment basis, finding that Mr. Takahashi had a constitutionally-protected right to commercially fish and the State of California could not discriminate upon an ethnic basis so as to abridge this right. To eliminate potential hedging upon its decision the court first said:

> Accordingly, for the purpose of our decision we may assume that the code provision was passed to conserve fish

> in the California coastal waters, or to protect California citizens engaged in commercial fishing from the competition by Japanese aliens, or for both reasons.

(at page 418).

The court then reversed the California Supreme Court and voided the state statute:

> The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this county shall abide "in any state" on an equality of legal privileges with all citizens under non-discriminatory laws.

(at page 420).

One of the laws adopted under the aegis of the Fourteenth Amendment was the Civil Rights Act of 1866, which is codified in part today as 42 U.S.C., § 1983, which reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party

injured in an action at law, suit in equity, or other proper proceedings for redress.

Over ninety years ago federal circuit Judge Sawyer said in *In re Ah Chong*, 2 Fed. 733, at 737 (1880):

> To subject the Chinese to imprisonment for fishing in the waters of the state, while aliens of all European nations under the same circumstances are exempt from punishment whatever, is to subject the Chinese to other and entirely different punishments, pains, and penalties than these to which others are subjected, and it is to deny them the equal protection of the laws . . .

The regulations of the Washington State Department of Fisheries which are being selectively enforced against Mr. Bergh under a department policy of ethnic discrimination due to the implementation orders of Judge Boldt violate Article IV and the Fourteenth Amendment to the United States Constitution and the Civil Rights Act of 1866, 42 U.S.C., § 1983, and should be enjoined. Such selective enforcement is patently illegal. *In re Ah Chong, supra; Yick Wo v. Hopkins*, 118 U.S. 356, at 369.

A major argument which has been marshalled in this case against this plain reading of the Fourteenth Amendment is the constitutional clause that treaties are the supreme law of the land; this is a misreading of the clause:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding.

(Article VI).

Treaties are given no special precedence under this provision. In addition, the point has been unequivocally answered as to a conflict between an Indian treaty and the United States Constitution or subsequent conflicting legislation.

By treaty of the Cherokee Nation was guaranteed freedom from taxes upon its tobacco products; subsequently, the Congress passed a general tobacco tax statute that the revenue department applied to the Cherokees. Mr. Justice Swayne, speaking in the *Cherokee Tobacco Case*, 78 U.S. 616 (1870), set the record straight on the supreme law:

> It hardly need to be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument. This results from the nature and fundamental principle of our government.

The court then stated the general principle as to statutory and treaty language conflicts:

> A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty. . . . and no greater inviolability or immunity can be claimed for them [treaties].

The court then pronounced the rule of the case: the treaty conflicted with subsequent legislation and was void to the extent of that conflict and the tobacco tax was exactable.

Here we find two important statutes which were enacted subsequent to the 1854 Indian treaties which were the issue in Judge Boldt's decision. There are the Civil Rights Act of 1866 and the Indian Citizenship Act of 1924 (43 Stat. 253). In addition, there is the subsequent United Nations Charter which the United States Senate ratified as a treaty which binds our government to adhere to:

> (c) Universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

(59 Stat. 1035, at 1045-1046).

Finally, this counsel submits that under the decision written by Justice Douglas in *Puyallup II* (*Puyallup Tribe v. Department of Game*, 391 U.S. 392, at 399 (1968), that as to Indian commercial fishing which utlizes the resources and the markets of the general society the state police power is plenary and

unrestricted but must be nondiscriminating in its application.

> But the manner of fishing, the size of the take, *the restriction on commercial fishing*, and the like may be regulated by the State in the interest of conservation. . . .

(Emphasis added.)

Interestingly, the Ninth Circuit Court of Appeals had seen the distinction between commercial fishing and reservation-oriented fishing in *Strom v. Commission*, 158 F.2d 520 (1947), where it adopted as its own opinion the tax court's decision, which, in part, stated:

> It is a far cry from the fishing operations of the members of an uncivilized tribe of Indians at the time of execution of this treaty, and the commercial fishing business now carried on by these petitioners.

The Indians are entitled to participate in commercial fishing for salmon foodfish in Washington waters on the same basis as petitioner without discrimination; petitioner is entitled to participate in commercial fishing for salmon foodfish in Washington waters on the same basis as the Indians without discrimination. This is the relief Mr. Bergh seeks. History saw the nation make the Indian a second-class citizen by Chicanery and mistake of law. Yes just as surely we are making other

segments of our nation into a discriminated class to relieve the pangs of guilt. This court should follow the purity or theory in our constitutional mandate of equal protection of the laws and enjoin the discriminatory adoption and enforcement of commercial fishing regulations.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted along with the review of *Department of Game v. Puyallup Tribe, Inc., supra.*

Respectfully submitted,

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Counsel for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO._____

LOREN BERGH, Petitioner,

v.

STATE OF WASHINGTON; THOR TOLLEFSON, DIRECTOR OF THE WASHINGTON STATE DEPARTMENT OF FISHERIES; WASHINGTON STATE DEPARTMENT OF FISHERIES; EDGAR SCOFIELD and GEORGE BOLDT, Respondents.

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FILED
UNITED STATES DISTRICT COURT
Western District of Washington
NOV 6 1974
EDGAR SCOFIELD, Clerk
By /s/ JD Deputy

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LOREN BERGH)
) CAUSE NO. C74-524S
vs.)
) JUDGMENT
STATE OF WASHINGTON ETAL)
)

This action came on for consideration before the Court, Honorable DONALD S. VOORHEES, United States District Judge, presiding, and the issues having been duly considered, and a decision having been duly rendered,

Plnt's Motion for Summary Judgment is denied. Defendants Boldt and Scofield to dismiss is granted. Motion of defendants State of Washington, Thor Tollefson and the Washington State Dept. of Fisheries to dismiss is granted.

It is Ordered and Adjudged,

Case is dismissed.

Dated this 6 day of November, 1974.

/s/ R. Chris
Deputy Clerk of Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LOREN BERGH,)
Plaintiff,) No. C74-524S
vs.)
STATE OF WASHINGTON, et al.,) ORDER
Defendants.)
)

Having considered the motion of plaintiff for summary judgment against defendants State of Washington, Thor Tollefson and the Washington State Department of Fisheries, the motion of defendants George Boldt and Edgar Scofield to dismiss, and the motion of defendants State of Washington and Thor Tollefson and the Washington State Department of Fisheries to dismiss, the memoranda presented in support of and in opposition thereto, and the oral argument of counsel, the Court is of the opinion that plaintiff's action is a collateral attack upon the judgment rendered by the Honorable George Boldt in United States v. State of Washington, (W.D. Wash., Civil No. 9213) and is an impermissible attempt to relitigate issues already litigated and ruled upon in that action, now therefore,

Plaintiff's motion for summary judgment is hereby DENIED.

The motion of defendants Boldt and Scofield to dismiss is GRANTED, and

The motion of defendants State of Washington, Thor Tollefson and the Washington State Department of Fisheries to dismiss is GRANTED.

IT IS SO ORDERED.

The Clerk of this Court is instructed to send uncertified copies of this order to all counsel of record.

DATED at Seattle, Washington, this 6 day of November, 1974.

/s/ Donald S. Voorhees
United States District Judge

FILED
MAY 27 1976
/s/ JD
EMIL E. MELFI, JR.
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOREN BERGH, Plaintiff-Appellant, v. STATE OF WASHINGTON; THOR TOLLEFSON, Director of Washington State Department of Fisheries; WASHINGTON STATE DEPARTMENT OF FISHERIES; EDGAR SCOFIELD; GEORGE BOLDT; Defendants-Appellees.	No. 75-1511 O R D E R DOCKETED MAY 27 1976

Appeal from the United States District Court for the Western District of Washington

Before: CHAMBERS and KENNEDY, Circuit Judges, and JAMESON,* District Judge.

Appellant's petition for rehearing is DENIED.

*Honorable William J. Jameson, United States District Judge for the Western District of Washington, sitting by designation

FILED
MAY 3 1976
/s/ JD
EMIL E. MELFI, JR.
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOREN BERGH, Plaintiff-Appellant, v. STATE OF WASHINGTON; THOR TOLLEFSON, Director of Washington State Department of Fisheries; WASHINGTON STATE DEPARTMENT OF FISHERIES; EDGAR SCOFIELD; GEORGE BOLDT: Defendants-Appellees.	No. 75-1511 O P I N I O N

On Appeal from the United States District Court For the Western District of Washington

Before: CHAMBERS and KENNEDY, Circuit Judges, and *JAMESON, District Judge.

PER CURIAM:

Appellant Loren Bergh is a commercial fisherman, duly licensed by the State of Washington. He brought suit seeking injunctive and declaratory relief against the following: The Honorable George Boldt, United States District Court; Edgar Scofield, Clerk of the District Court for the Western District of Washington; the State of Washington and its Department of Fisheries; and Thor Tollefson, the department director. Appellant challenges

*Honorable William J. Jameson, United States District Judge for the District of Montana, sitting by designation.

certain regulations, promulgated by the State of Washington in response to Judge Boldt's decision in United States v. State of Washington, aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 44 U.S.L.W. 3428 (U.S. Jan. 1, 1976). Appellant claims that the regulations gave Indian fishermen greater fishing rights than non-Indian fishermen and that this constitutes unlawful discrimination on the basis of race, in violation of the Civil Rights Act of 1866, 42 U.S.C.§ 1983, and the fourth article and fourteenth amendment of the Constitution. Specifically, appellant sought to enjoin (1) Judge Boldt from ordering the State of Washington to promulgate regulations favoring Indian fishermen, (2) Edgar Scofield from filing any such order, and (3) Thor Tollefson and the Washington State Department of Fisheries from adopting and enforcing such regulations. The district court dismissed the action in a memorandum order dated November 6, 1974. We affirm.

When an injunction sought in one federal proceeding would interfere with another federal proceeding, considerations of comity require more than the usual measure of restraint, and such injunctions should be granted only in the most unusual cases. Arthur Kahn Co. v. Switzer Bros., 201 F.2d 55 (6th Cir. 1952). Where, as here, the two federal courts are of coordinate jurisdiction, and their decisions are reviewed by the same Court of Appeals, the issuance of such an injunction is rarely, if ever, justified. United States v. American Radiator & Standard Sanitary Corp., 388 F.2d 201, 203-04 (3d Cir. 1967), cert. denied, 390 U.S. 922 (1968). In such cases, "[t]he proper exercise of restraint in the name of comity keeps to a minimum the conflicts between courts administering

the same law, conserves judicial time and expense, and has a salutary effect upon the prompt and efficient administration of justice." Brittingham v. Commissioner, 451 F.2d 315, 318 (5th Cir. 1971).

The injunction against Judge Boldt and Clerk Scofield was properly denied on the further ground that appellant lacks standing to affect the disposition of an action to which he is not a party. The proper course would have been to seek intervention. Fed. R. Civ. Pro. 24.

Dismissal of the complaint against the State of Washington and its officials was also proper. While the promulgation of regulations by the State of Washington may result in future injury to appellant, the constitutional challenge to the regulation is not ripe for decision in the present posture of this case. See Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1, 70-81 (1961); Poe v. Ullman, 367 U.S. 497, 500-509 (1961) (opinion of Frankfurther, J.); United Public Workers of America v. Mitchell, 330 U.S. 75, 86-91 (1947); Rincon Band of Mission Indians v. County of San Diego, 495 F.2d 1, 2-7 (9th Cir. 1974). We note, moreover, that the propriety of these regulations was concurrently being considered by Judge Boldt in United States v. State of Washington. As Mr. Justice Harlan has noted, "A court may . . . in its discretion dismiss a declaratory judgment or injunctive suit if the same issue is pending in litigation elsewhere." Abbott Laboratories v. Gardner, 387 U.S. 136, 155 (1967). The dismissal of the complaint was therefore proper as to all parties, and is hereby affirmed.

CHAMBERS, Circuit Judge, concurring:

I concur in Judge Kennedy's opinion.

He has said all that is necessary to dispose of the case.

However, there are other problems with the case. Without arguing them or listing all of them, I suggest a couple:

1. How on earth could the clerk of the district court be a proper party?

2. How could Judge Boldt be a proper party? (Counsel in oral argument seemed to suggest it could be done by simply calling Judge Boldt by the name of "Mr. Boldt.")

In a proper case, mandamus might lie, but that is not available for a collateral attack.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA, et al, Plaintiffs, vs. STATE OF WASHINGTON, et al, Defendants	) CIVIL) NO. 9213)) RULINGS ON) POST DECISION) MOTIONS)

Following entry of Final Decision #1 (FD#1) on February 12, 1974 a number of motions for reconsideration and other purposes were served and filed. After briefing, all pending motions were heard on oral argument March 5, 6, 18, 19 and 20, 1974. During argument, oral and tentative rulings were made on a number of said motions and ruling on other was deferred for further consideration by counsel and the court. The court fully reviewed all the proposals of counsel pertaining to said motions, and having considered each motion this order is entered as formal and final ruling on each and all of said motions.

1. Motions of Northwest Steelheaders Council of Trout Unlimited and Purse Seine Vessel Owners Association to intervene as parties defendant.

The motions of these organizations to change their status from amicus curiae in this litigation to intervenir defendants is found by the court to be untimely and unnecessary in each instance because their interests have been and will continue to be adequately represented by the State of Washington, its Game Commission and Fisheries Department and their counsel

and therefore each of said motions is hereby denied. Both organizations may continue to act as amicus by serving and filing briefs, both in this court and on appeal, and in any proceeding in this court during appeal. Either of said amici may apply for permission to participate in some other particular in any future specific proceeding.

2. Washington Reef Net Owners Association's motion to amend or make new Findings, Conclusions and Judgment.

The court finding said motion without merit in all particulars, it is hereby denied.

3. Yakima Nation's motions for (a) Reconsideration of FD#1 re state power to regulate federal treaty right fishing and (b) for approval of self-regulating status.

Motion 3(a) was heard, considered and denied thereof is hereby confirmed. Motion 3(b) is granted subject to adoption of a regulation by the Yakima Nation comparable to that filed with the court by the Quinault Tribe on 3/18/74.

4. Quinault, Makah, Lummi and Quileute Tribes' motion re adjudication of allocation of propagated and natural fish.

The court has jurisdiction to adjudicate such issue in this case but hereby reaffirms the ruling stated in FD#1 providing for initial adjudication by state courts.

5. Lummi tribe motion for post FD#1 order re Lummi reef net fishing.

The parties involved have reported to the court that they are near reaching an

agreed solution. Therefore, ruling on this motion is deferred, subject to reconsideration when the parties submit their final report.

6. Fisheries' motion for reconsideration.

This motion includes a considerable number of written questions submitted during argument. Each particular question presented has been considered and in some instances oral ruling was made thereon. Rulings on all questions posed by Fisheries are specified in Exhibit "A" attached hereto and by this reference are made a part hereof. Said rulings are hereby confirmed as the formal and final order of said motion in each and all particulars.

7. Game's motion for clarification and amendment of Final Decision #I.

The oral decision on 3/6/74 holding that treaty right fishermen may sell or otherwise deal commercially with steelhead taken per tribal regulations at usual and accustomed places is hereby affirmed. The motion is otherwise denied, except as provided in the rulings on the Fisheries' motion.

8. Motions for attorneys' fees and costs.

By agreement these motions will be heard and determined at an early date following briefing on a stipulated schedule.

Exceptions to any of said rulings by any party aggrieved thereby is hereby noted.

IT IS SO ORDERED.

Upon entry hereof the Final Decision #I and the Declaratory Judgment and Decree entered herein 2/12/74 become unreservedly final and reviewable as provided by 28 U.S.C.A. 2201.

Dated this 22nd day of March, 1974.

/s/ George H. Boldt
Senior United States District Judge

[No. 43736. En Banc. April 8, 1976.]

THE DEPARTMENT OF GAME, ET AL, *Respondents*, v. PUYALLUP TRIBE, INC., ET AL, *Appellants*.

[1] **Fish—Indians—State Conservation Rules—Jurisdiction—In General.** The State has jurisdiction to determine the extent to which it may regulate resources for conservation purposes, and the extent to which treaty rights may exempt Indians from such conservation regulations.

[2] **Courts—Jurisdiction—Federal Issue—Remand.** A remand from the United States Supreme Court to the Supreme Court for determination of a federal issue confers jurisdiction upon the Supreme Court for such purposes.

[3] **Fish—Indians—State Conservation Rules—Jurisdiction—On-Reservation Controls.** The jurisdictional scope of the State's powers to enforce fish resource conservation regulations is unaffected by the boundaries of an Indian reservation. When required to meaningfully control the conservation of a species of fish, both on-reservation and off-reservation areas may be regulated by the State.

[4] **Courts—Jurisdiction—Comity—Later Federal Action.** The mere happenstance of a later-commenced federal court action treating a similar subject matter does not affect the jurisdiction of the State to continue seeking a determination in a prior matter in the State's courts.

[5] **Fish—Indians—State Conservation Rules—Net Fishery—Requirement.** There is no requirement, under the Treaty of Medicine Creek, that the Department of Game create regulations permitting an Indian net fishery for steelhead trout.

[6] **Indians—Treaties—Construction—Intent of Parties—In General.** While Indian treaties are generally to be construed to reflect the Indians' understanding when in conflict with technical meanings, and to favor the Indians and resolve ambiguities in their favor, such construction rules do not require that the Indians' understanding must prevail, nor may the clear terms of a treaty be altered or construed to mean other than what they state even though other results may be considered desirable.

[7] **Fish—Indians—State Conservation Rules—"In Common With."** The right of Indians under the Treaty of Medicine Creek to fish "in common with" others merely means that fishing conservation regulations must accord equal treatment to both Indian and non-Indian fishermen.

[8] **Fish—Indians—State Conservation Rules—"Usual and Accustomed" Places.** The right of Indians under the Treaty of Medicine Creek to

have access to their usual and accustomed fishing grounds may not be contravened by the State.

[9] Fish—Indians—State Conservation Rules—Method of Fishing. Fish conservation regulations dealing with the methods by which a particular species is taken must, under both the federal equal protection mandate and the Treaty of Medicine Creek, apply equally to both Indian and non-Indian fishermen.

[10] Fish—Indians—Treaties—Natural and Artificial Fish Runs—Application. Any rights accorded Indians by the Treaty of Medicine Creek to a net fishery are only applicable to natural fish runs. Artificial-source fish runs are beyond the scope of the treaty.

[11] Appeal and Error—Review—Discretionary Matter. A matter subject to the equitable discretion of the trial court will not be disturbed on review in the absence of a manifest abuse of such discretion.

[12] Fish—Indians—State Conservation Rules—Steelhead Trout—Allocation. The Department of Game is the proper agency to allocate steelhead trout fish runs between Indian and non-Indian fishermen under the department's conservation regulations.

STAFFORD, C.J., and ROSELLINI, WRIGHT, UTTER, BRACHTENBACH, and HOROWITZ, JJ., concur by separate opinions.

Appeal from a judgment of the Superior Court for Pierce County, No. 158069, William L. Brown, Jr., J., entered April 8, 1975. *Affirmed as modified.*

Action to determine Indian steelhead trout fishing rights. Appeal taken from a judgment determining rights and allocating portions of the fish run.

Stan Pitkin, United States Attorney; Harry J. McCarthy, Assistant Attorney of the United States; George D. Dysart, Assistant Regional Solicitor; and *William H. Rodgers, Jr.*, for appellant Puyallup Tribe, Inc.

John Sennhauser, for appellant Bennett.

Slade Gorton, Attorney General, and *Edward B. Mackie, Deputy*, for respondent State.

Willner, Bennett, Riggs & Skarstad, by *Don S. Willner*, and *Riddell, Williams, Ivie, Bullitt & Walkinshaw*, by *Vincent R. Larson*, for respondents Northwest Steelheaders, et al.

HUNTER, J.—The appellants (defendants), the Puyallup Tribe and Ramona Bennett, the Tribal Council chairwoman,[1] appeal from a decision of the Superior Court for Pierce County, which determined the extent of their right to commercially fish for steelhead. The Washington State Department of Game has also appealed from certain aspects of the trial court's decision.

This case does not involve a conflict of recent origin. Rather, the initial litigation commenced in 1963. Since that time, we have written two decisions, both of which have been reviewed by the United States Supreme Court. In order to place the present case in proper perspective, we shall initially set forth the nature of the issues previously raised and the decisions rendered.

In *Department of Game v. Puyallup Tribe, Inc.*, 70 Wn.2d 245, 422 P.2d 754 (1967), we recognized that the Puyallup Tribe still existed and that its members enjoyed certain fishing rights under the Treaty of Medicine Creek. Furthermore, we held that these rights could only be limited through statute or regulations to the extent reasonably necessary for the conservation of the fishery. On review, the United States Supreme Court affirmed our decision. It held that while the rights secured by the treaty extended to off-reservation fishing, nevertheless "the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 398, 20 L. Ed. 2d 689, 88 S. Ct. 1725 (1967) (hereinafter cited as *Puyallup I*). However, that court remanded the case for a determination of the issue of whether the total bar against

[1]As we have pointed out twice before, "[t]he case caption is erroneous, there being no entity known as 'The Puyallup Tribe, Inc., a corporation.' The Puyallup Tribe of Indians did appear and answer by and through the chairman of the Tribal Council." *Department of Game v. Puyallup Tribe, Inc.*, 70 Wn.2d 245, 247 n.1, 422 P.2d 754 (1967), *quoted in Department of Game v. Puyallup Tribe, Inc.*, 80 Wn.2d 561, 563 n.1, 497 P.2d 171 (1972).

the use of set nets in freshwater streams or at their mouths was a reasonable and necessary conservation measure. In response to this decision, the Department of Fisheries, charged with the duty of regulating the salmon fishery, changed its regulations to allow a net fishery for salmon in those areas of the Puyallup River not utilized for spawning.

On the other hand, the Department of Game, which is the governing agency with regard to steelhead, refused to pass a similar regulation and continued to prohibit all net fishing for steelhead trout. In an appeal to this court, we held that the regulations passed by the Department of Fisheries were reasonable and consistent with the necessary conservation standards. *Department of Game v. Puyallup Tribe, Inc.*, 80 Wn.2d 561, 497 P.2d 171 (1972). In regard to steelhead, we stated that while the Indians may have a right to a net fishery, nevertheless the steelhead run was not of sufficient size to withstand a commercial net fishery for that year. On review, the United States Supreme Court held that a total ban of net fishing would discriminate against the Indians, since the steelhead fishery was totally preempted by the hook and line, non-Indian sport fishermen. *Department of Game v. Puyallup Tribe*, 414 U.S. 44, 38 L. Ed. 2d 254, 94 S. Ct. 330 (1973) (hereinafter cited as *Puyallup II*). That court remanded the case for a determination of the percentage of the run which had to be allowed to escape in order to perpetuate the species, and the number of catchable fish which had to be apportioned to an Indian commercial net fishery. In a concurring opinion, three Justices noted that the majority opinion applied only to the natural run of steelhead.

On remand, the Superior Court for Pierce County held that the fishing rights afforded under the treaty did not extend to the hatchery run, that one-half of the natural run had to be allowed to escape in order to perpetuate the species, and that the Indians were entitled to catch 45 percent of the remaining one-half of the natural run. The Puyallup Tribe has appealed from the trial court's decision in its entirety. The State Department of Game has appealed

from that portion of the decision which determined the size of the total natural run and the apportionment of 45 percent of the catchable fish to the tribe.

[1] At the outset it seems appropriate to discuss the jurisdictional aspects of this case. Appellants have contended all along that the state courts do not have jurisdiction in this matter because issues pertaining to federal treaty rights are exclusively federal matters. We believe this contention is without merit for two reasons. First, in this case the State is concerned with a matter that is clearly within its jurisdiction—it is seeking to determine the extent to which it can apply its sovereign power to regulate resources for the purpose of conservation. *See Puyallup I* at 398-400. In order to do so, it is necessary to determine the extent to which Indians may be exempt from state regulations because of overriding federal treaty rights. *See State ex rel. Campbell v. Case*, 182 Wash. 334, 341, 47 P.2d 24 (1935). In this posture, the case is analogous to "a suit to enjoin violations of state law by individual tribal members fishing off the reservation," a situation clearly within state jurisdiction. *See Puyallup I* at 397 n.11.

[2] Second, and more importantly, jurisdiction is proper because the United States Supreme Court specifically remanded this case for a determination of a fair allocation that "accommodate[s] the rights of Indians under the Treaty and the rights of other people." *See Puyallup II* at 49. We view *Puyallup II* as expressly conferring jurisdiction in this matter in the state courts.

[3, 4] It has also been contended that the recently established, continuing existence of the Puyallup Indian Reservation, *see United States v. Washington*, 496 F.2d 620 (9th Cir. 1974), *cert. denied*, 419 U.S. 1032 (1974), precludes any state jurisdiction over activities occurring within the reservation boundaries. We believe that this is at most simply not the case, and at least an open question after *Mattz v. Arnett*, 412 U.S. 481, 485, 37 L. Ed. 2d 92, 93 S. Ct. 2245 (1972). In addition, the Supreme Court's clear mandate in *Puyallup II* would seem to include on-reserva-

tion state jurisdiction. In order to control the escapement necessary for the conservation of the species, it is inescapable, given the geography in this case, that the State must be able to control on-reservation fishing activities. State regulation of on-reservation fishing is mandated by, and consistent with, the Supreme Court's view of Indian treaty rights as presented in *Puyallup II* at page 49:

> We do not imply that these fishing rights persist down to the very last steelhead in the river. Rights can be controlled by the need to conserve a species; and the time may come when the life of a steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets.

Finally, any suggestion that this court should defer to the United States District Court of Western Washington, in light of its continuing jurisdiction in a similar fishing matter, on grounds of comity, is not well taken. The present case was remanded by the Supreme Court to the state courts before that federal action was even started. There is no reason we should defer to the subsequently commenced, ongoing litigation in that federal court.

Therefore, we conclude that our jurisdiction is proper. Furthermore, as will be indicated later in the opinion, continuing jurisdiction over the Indians' steelhead fishery must be exercised by the State Department of Game.

Before considering the issues raised by the appellants and cross-appellants, an analysis of the United States Supreme Court's decision in *Puyallup II* is essential. Reading *Puyallup II* in context with *Puyallup I*, we feel that the issue of whether the Treaty of Medicine Creek gives the Indians a right to a commercial net fishery is at least an open question. In *Puyallup II*, the United States Supreme Court stated on page 48: "Our prior decision recognized that net fishing by these Indians for commercial purposes

was covered by the Treaty. 391 U.S., at 398-399." However, as demonstrated below, the language of *Puyallup I* does not bear this out. In *Puyallup I*, the United States Supreme Court made the following statement on page 398:

> The treaty right is in terms the right to fish "at all usual and accustomed places." We assume that fishing by nets was customary at the time of the Treaty; and we also assume that there were commercial aspects to that fishing as there are at present. But the *manner* in which the fishing may be done and its purpose, whether or not commercial, are not mentioned in the Treaty. We would have quite a different case if the Treaty had preserved the right to fish at the "usual and accustomed places" *in the "usual and accustomed" manner*. But the Treaty is silent as to the mode or modes of fishing that are guaranteed. Moreover, the right to fish at those respective places is not an exclusive one. Rather, it is one "in common with all citizens of the Territory." Certainly the right of the latter may be regulated. And we see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power of the State. The right to fish "at all usual and accustomed" places may, of course, not be qualified by the State, even though all Indians born in the United States are now citizens of the United States. Act of June 2, 1924, 43 Stat. 253, as superseded by § 201(b) of the Nationality Act of 1940, 8 U. S. C. § 1401(a)(2). But the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians.

In the final paragraph of the *Puyallup I* opinion, the Supreme Court drew the following conclusion on pages 401-03:

> Whether the prohibition of the use of set nets in these fresh waters was a "reasonable and necessary" (70 Wash. 2d, at 261, 422 P.2d, at 764) conservation measure was left for determination by the trial court when the Supreme Court, deeming the injunction in No. 247 too broad, remanded the case for further findings. When the case was argued here, much was said about the *pros* and the *cons* of that issue. Since the state court has given us no authoritative answer to the question, we leave it un-

> answered and only add that any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the phrase "in common with."

(Footnotes omitted.) Therefore, it certainly appears that the United States Supreme Court in *Puyallup I* declined to interpret the Medicine Creek Treaty with regard to the Indians' right to a net fishery. We recognized this in our second decision, *Department of Game v. Puyallup Tribe, Inc.*, 80 Wn.2d 561, 497 P.2d 171 (1972), when we stated on page 568:

> [T]here can no longer be any question that *whatever the United States Supreme Court may ultimately construe to be the Indian rights to fish under the Medicine Creek Treaty*, they are subject to the reach of the state powers and regulations necessary to the conservation of the fishery, providing the regulations are not discriminatory against the Indians.

(Italics ours.)

[5] In addition, it is important to place our decision in the above case in the correct perspective. The controlling issue there was the validity of regulations enacted by the Department of Fisheries and the Department of Game. The Department of Fisheries' regulations allowed an Indian net fishery in the Puyallup River for salmon, subject to certain limitations for conservation purposes. The Department of Game regulations prohibited a net fishery for steelhead. Our decision was designed to determine the reasonableness of regulations and not to interpret the treaty itself. It was unnecessary to decide whether the Department of Game was *required* to pass a regulation allowing a net fishery for steelhead. Consequently, we overstated our case by indicating that an Indian net fishery was a matter of right under the treaty. To the extent that our decision lends itself to this interpretation, it is hereby overruled.

Considering the present appeal in this posture, we now direct our analysis to the interpretation of the Treaty of Medicine Creek that we deem to be correct. We feel that an interpretation is necessary as an initial matter in order to

arrive at an allocation of steelhead in the Puyallup River that is consistent with and takes into account Indian rights under the treaty. Those rights must be determined before they can be given effect.

If the Treaty of Medicine Creek, December 26, 1854 (10 Stat. 1132), provides the Puyallup Indians with any fishing right at all beyond those possessed by ordinary citizens, the provision that does so is article 3 (10 Stat. 1133). *See Puyallup I* at 394-95 n.1. The pertinent language of article 3 is the following:

> *The right of taking fish*, at all usual and accustomed grounds and stations, is further secured to said Indians, *in common with all citizens of the Territory* . . .

(Italics ours.) It is the interpretation of this treaty language that is crucial to any determination of Indian fishing rights. As with any Indian treaty, of course, certain long-standing and often stated rules of construction govern this very significant interpretation.

[6] The rules of interpretation applicable to Indian treaties have been variously stated. Basically, treaties are to be interpreted in accord with the intent of the parties. So far as possible, the sense in which the Indians understood the treaties rather than a technical legal meaning should be given effect. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631, 25 L. Ed. 2d 615, 90 S. Ct. 1328 (1970); *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432, 87 L. Ed. 877, 63 S. Ct. 672 (1943); *United States v. Shoshone Tribe*, 304 U.S. 111, 116, 82 L. Ed. 1213, 58 S. Ct. 794 (1938); *Starr v. Long Jim*, 227 U.S. 613, 623, 57 L. Ed. 670, 33 S. Ct. 358 (1913), quoting *Jones v. Meehan*, 175 U.S. 1, 11, 44 L. Ed. 49, 20 S. Ct. 1 (1899); *United States v. Winans*, 198 U.S. 371, 49 L. Ed. 1089, 25 S. Ct. 662 (1905); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 581, 8 L. Ed. 483 (1832). The United States Supreme Court stated this principle in *Tulee v. Washington*, 315 U.S. 681, 684, 86 L. Ed. 1115, 62 S. Ct. 862 (1942), as follows:

> It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the

> meaning they were understood to have by the tribal representatives at the council, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.

Another recognized rule of construction requires that the language in treaties and statutes ratifying agreements with the Indians be construed liberally in favor of the Indians and never to their prejudice. *Antoine v. Washington*, 420 U.S. 194, 199, 43 L. Ed. 2d 129, 95 S. Ct. 944 (1975); *Choctaw Nation of Indians v. United States*, *supra* at 431; *Worcester v. Georgia*, *supra*. Likewise, any ambiguities or "doubtful expressions" are to be resolved in favor of the Indians. *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 174, 36 L. Ed. 2d 129, 93 S. Ct. 1257 (1973), quoting *Carpenter v. Shaw*, 280 U.S. 363, 367, 74 L. Ed. 478, 50 S. Ct. 121 (1930); *Choctaw Nation v. Oklahoma*, *supra*; *Winters v. United States*, 207 U.S. 564, 576, 52 L. Ed. 340, 28 S. Ct. 207 (1908).

These canons of construction, however, are not without their limitations. With regard to the rule that resolves ambiguities in favor of the Indians, the United States Supreme Court recently stated in *DeCoteau v. District County Court*, 420 U.S. 425, 447, 43 L. Ed. 2d 300, 95 S. Ct. 1082 (1975), as follows:

> We give this rule the broadest possible scope, but it remains at base a canon for construing the complex treaties, statutes, and contracts which define the status of Indian tribes. *A canon of construction is not a license to disregard clear expressions of tribal and congressional intent.*

(Italics ours.) Similar limitations apply to all the liberal rules of construction mentioned above. First, the attempt as an initial matter, to prefer the Indians' understanding of a treaty does not mean that their alleged understanding *must* prevail. "[E]ven Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." *Choctaw Nation of Indians v. United States*, *supra* at 432. *See Skokomish Indian Tribe v. France*, 320 F. 2d 205,

207 (9th Cir. 1963). The United States Supreme Court has also stated that

> [w]e attempt to determine what the parties meant by the treaty. We stop short of varying its terms to meet alleged injustices. Such generosity, if any may be called for in the relations between the United States and the Indians, is for the Congress.

(Footnote omitted.) *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 353, 89 L. Ed. 985, 65 S. Ct. 690 (1945).

Second, the Supreme Court has said that it cannot "under the guise of interpretation, create presidential authority where there was none, nor rewrite congressional acts so as to make them mean something they obviously were not intended to mean." *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 179, 91 L. Ed. 823, 67 S. Ct. 650 (1947). Indian rights cannot be determined "under any acceptable rule of interpretation" merely because the Indians thought the right existed. *Confederated Bands of Ute Indians v. United States*, *supra* at 180. Hence, if the language in an Indian treaty is clear and unambiguous, then the courts cannot interpret the treaty in a way that will expand or go beyond the rights that are plainly set out by the treaty.

As heretofore stated, the important language to be construed in article 3 of the Treaty of Medicine Creek is "[t]he right of taking fish . . . is further secured to said Indians, in common with all citizens of the Territory." The meaning of this clause is clear and unambiguous on its face. Its plain meaning has significance and confers a distinct benefit. However, interpretation of the treaty requires us to construe and give meaning to the phrase "in common with."

[7, 8] The general meaning of "common" has changed very little since the Treaty of Medicine Creek was written. *Compare* N. Webster, *An American Dictionary of the English Language* 231 (1862), and *A Dictionary of American English* 575 (W. Craige ed. 1936) *with Webster's Third*

New International Dictionary (1961). The basic definition of "common" is not complicated. "Common" means "of or relating to a community at large (as a family unit, social group, tribe, political organization, or alliance) . . ." It therefore seems obvious that this treaty provision simply means that the Indians share in common, that is, share equally, with other citizens the opportunity to take fish. This treaty provision requires that as to their "accustomed grounds and stations" the Indians must not be denied the right to fish to the same extent as all other citizens of the state. State regulations governing fishing resources must treat Indians no better or worse than other citizens.

The United States Supreme Court seemed to recognize this interpretation when it said in the last paragraph of *Puyallup I*, on page 403, "that any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the phrase 'in common with.'" History also supports the view that the intent of the parties, as is clear from the provision's language, was to preserve equal treatment for the Indians.

There were absolutely no limitations on anyone, Indian or non-Indian, as to the steelhead or salmon harvest until the last part of the nineteenth century. *See Uncommon Controversy: Fishing Rights of the Muckleshoot, Puyallup, and Nisqually Indians* 61-62 (A Report Prepared for the American Friends Service Comm.) (U. W. Press 1970); Johnson, *The States Versus Indian off-Reservation Fishing: A United States Supreme Court Error*, 47 Wash. L. Rev. 207, 213-14 (1972).[2] This fact clearly indicates that at the time

[2]Up to 1921, the regulation of the fisheries that did occur was undertaken directly by the state legislature without technical help. The regulations reflected no more than a cursory knowledge of conservation requirements and consisted of limited time closures and increasingly stricter limitations on fixed gear. J. Crutchfield & G. Pontecorvo, *The Pacific Salmon Fisheries* 131-32 (1969). *See, e.g.*, Laws of 1899, ch. 117, §§ 1 and 2, p. 194-95; Laws of 1897, ch. 82, §§ 1-3, p. 214-16. *See also State v. Allen*, 80 Wash. 83, 141 P. 292 (1914).

The use of the most effective methods of catching fish, *e.g.*, fixed appliances such as fish traps and setnets, was not completely prohibited until 1935. Laws of 1935, ch. 1, § 8, p. 6. This prohibition was the result

of the treaty in 1854, the parties did not contemplate the event of conservation requirements necessary to preserve the species. There was an inexhaustible supply of fish, *see Uncommon Controversy, supra* at 4 n.3, 61-62, and the treaty was undoubtedly premised on this condition. Consequently, it is inconceivable that the parties to the treaty contemplated an allocation of the fish or an advantage of one over the other in the manner of taking fish. The fish were there for the taking. It was important only for the Indians to enjoy the right of taking fish in common with, *i.e.*, on an equal basis with, the citizens of the territory. This is exactly what the parties must have intended. It is what the language of article 3 plainly provides in addition to assuring the Indians access to certain geographical fishing areas.

Our interpretation of article 3 means that Indians under treaties concerning fishing rights "in common with all citizens" are, to the same extent as other citizens, subject to state conservation regulations that meet appropriate standards. *See Puyallup I* at 398-99. However, the Indians' treaty right to fish "at all usual and accustomed grounds and stations" cannot be qualified by the State. *See Antoine v. Washington, supra* at 206-07; *Puyallup I* at 398; *United States v. Winans, supra* at 381, 384. Thus the treaty language guarantees the Indians access to their usual and accustomed fishing grounds. This right of access cannot be contravened by the State even in the exercise of its police power for the conservation of fish as a natural resource. But the State can, for the purposes of conservation, properly regulate the public's right to fish and such regulations are applicable equally to Indians and non-Indians.

The United States Supreme Court's treatment of similar language in other Indian treaties is consistent with the above analysis. For instance, the court stated in *United*

not of legislative action but of an initiative measure which was approved at the general election on November 6, 1934. Moreover, it was not until 1947 that the steelhead species was classified as a game fish and thus became subject to the special regulations enforced by the Department of Game. *See* Laws of 1947, ch. 275, § 10, p. 1200.

States v. Winans, *supra* at 381, that the right of taking fish at all usual and accustomed places

> was a right outside of those boundaries [the reservation] reserved "in common with the citizens of the Territory." As a mere right, it was not exclusive in the Indians. Citizens might share it, but the Indians were secured in its enjoyment by a special provision of means for its exercise.

The court further stated that this right does not "restrain the State unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enables the right to be exercised." *United States v. Winans*, *supra* at 384.

Other Supreme Court treatments of this problem recognize more explicitly the equal regulation aspect. In *New York ex rel. Kennedy v. Becker*, 241 U.S. 556, 563, 60 L. Ed. 1166, 36 S. Ct. 705 (1916), which, as against Indians claiming a treaty right, upheld a state regulation prohibiting spear fishing, the Supreme Court justified the result as follows:

> Rather are we of the opinion that the [treaty] clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting *upon the granted lands* in common with the grantees, and others to whom the privilege might be extended, but subject nevertheless to that necessary power of appropriate regulation, *as to all those privileged*, which inhered in the sovereignty of the State . . .

(Italics ours.)

In *Tulee v. Washington*, *supra* at 685, the Supreme Court held that a state regulation requiring license fees for fishing could not be applied to Indians because "such exaction of fees as a prerequisite to the enjoyment of fishing in the 'usual and accustomed places' cannot be reconciled with a fair construction of the treaty." However, the Supreme Court did clearly recognize the State's right to regulate for conservation when it stated earlier in the opinion on page 684, that

> the treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely

> regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish . . .

(Footnote omitted.)

Further support for the interpretation presented above —that the Indians share equally, *i.e.*, in common with other citizens, the public right to fish and, in addition, are guaranteed access to certain fishing locations—is found in *Seufert Bros. Co. v. United States*, 249 U.S. 194, 63 L. Ed. 555, 39 S. Ct. 203 (1919). This case is particularly relevant because it involved article 3 of the Treaty with the Yakimas, June 9, 1855 (12 Stat. 25). That provision is nearly identical to article 3 of the Treaty of Medicine Creek. The two treaties were entered into contemporaneously. *See Seufert Bros. Co. v. United States*, *supra* at 196. The Supreme Court interpreted the treaty language as follows:

> How the Indians understood this proviso we are considering is not doubtful. During all the years since the treaty was signed they have been accustomed habitually to resort for fishing to the places to which the decree of the lower court applies, and they have shared such places with Indians of other tribes from the south side of the river and with white men. This shows clearly that their understanding of the treaty was that they had the right to resort to these fishing grounds and make use of them in common with other citizens of the United States,—and this is the extent of the right that is secured to them by the decree [injunction] we are asked to revise.

Seufert Bros. Co. v. United States, *supra* at 198-99. *See Puyallup I* at 399.

We conclude therefore that a proper interpretation of the Treaty of Medicine Creek permits the State to promulgate conservation regulations meeting appropriate standards that affect all citizens, Indian and non-Indian, equally. However, such regulations cannot deny the Indians access to their usual and accustomed fishing places, nor can they restrain Indian fishing at those places except to the extent the regulations restrain the fishing rights of all state citi-

zens, *e.g.*, regulations as to time and manner of fishing, size of catch, etc.

It should be noted that this interpretation of the treaty grants to the Indians certain rights that they otherwise would not clearly have retained at the time. In addition to guaranteeing access to certain fishing locations, article 3 of the treaty put them on an equal footing with "all citizens of the Territory." Admittedly, such equal treatment would be superfluous today—it would give the Indians no additional rights beyond those that they already possess. But at the time of the treaty, equal footing with citizens of the Territory was very significant. When the treaty was written Indians were not citizens and, in addition, some of the normal methods of obtaining citizenship were not open to them. *See Cohen's Handbook of Federal Indian Law* 154 (1971). Article 3 served a definite purpose because it assured the Indians that they would have a right to uninhibited access to their usual and accustomed fishing grounds. This guaranty was not unimportant in the context of a government policy designed to restrict the Indians to residence on the reservations as much as possible in order to avoid conflict between the Indians and the settlers. *See* E. Swindwell, *Report on Source, Nature, and Extent of the Fishing, Hunting and Miscellaneous Related Rights of Certain Indian Tribes in Washington and Oregon* 55, 58-59 (Department of the Interior, 1942); *Uncommon Controversy, supra* at 41-42; Coan, *The Adoption of the Reservation Policy in Pacific Northwest 1853-1855*, 23 Ore. Historical Q. 1, 12, 14 (1922). Consequently, the interpretation above, which means the Indians were assured equal treatment at the time of the treaty (plus the absolute right of access to certain locations), does not mean that the Indians were merely given something that they would have had even without the treaty. *Cf. United States v. Winans*, 198 U.S. 371, 380, 49 L. Ed. 1089, 25 S. Ct. 662 (1905).

Certain treaty rights may now be nugatory due to subsequent events, that is, they are now enjoyed by the Indians simply because they are citizens of the United States. This

does not mean, however, that a court in the context of interpretation can expand and rewrite a treaty beyond its clear meaning at the time it was entered into. *See Choctaw Nation of Indians v. United States*, 318 U.S. 423, 87 L. Ed. 877, 63 S. Ct. 672 (1943).

The Treaty of Medicine Creek clearly provided for significant rights at the time it was concluded. The treaty cannot now be expanded beyond its unambiguous terms even if some of those terms have been superseded, thus making the treaty arguably unjust. *See Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 89 L. Ed. 985, 65 S. Ct. 690 (1945).

Because the treaty, as well as the equal protection guaranties to the Constitution, demands that the Indians receive equal treatment, it is uncontroverted that any state regulation of fishing may not discriminate, that is, the regulations must apply equally to all citizens whether Indian or non-Indian. *See Puyallup I* at 398, 403; *cf. New York ex rel. Kennedy v. Becker*, *supra* at 562. In the absence of an overriding federal treaty right granting the Indians a right to fish for steelhead trout with nets, state regulations allowing Indians to fish with nets while denying that manner of fishing to other citizens would be discriminatory and, hence, improper. *Cf. State ex rel. Campbell v. Case*, 182 Wash. 334, 341, 47 P.2d 24 (1935). Equal protection is denied when similarly situated persons, *e.g.*, all state citizens including Indians, are treated differently by allowing only a certain class to fish with nets. *See Truax v. Corrigan*, 257 U.S. 312, 334, 66 L. Ed. 254, 42 S. Ct. 124, 27 A.L.R. 375 (1921); *State ex rel. Bacich v. Huse*, 187 Wash. 75, 80, 59 P.2d 1101 (1936). Thus there would be no discrimination if all net fishing, including Indian net fishing, were prohibited. There is also no discrimination where all state citizens are only allowed to fish by a certain method, *e.g.*, by hook and line. Illegal discrimination would occur only where one group is given special rights that the other group is denied, *e.g.*, allowing only Indians to net fish or allowing only non-Indians to fish with hook and line. *See Thomson v.*

Dana, 52 F.2d 759, 764 (D. Ore. 1931), *aff'd per curiam*, 285 U.S. 529, 76 L. Ed. 925, 52 S. Ct. 409 (1932); *State v. Hals*, 90 Wash. 540, 542-43, 156 P. 395 (1916); *Barker v. State Fish Comm'n*, 88 Wash. 73, 76-77, 152 P. 537 (1915).

[9] Therefore, in the absence of special federal rights, state regulations permitting only one group to utilize a certain fishing method would be discriminatory and in violation both of constitutional equal protection guaranties and the straightforward language of the Treaty of Medicine Creek. Consequently, we hold that the manner of fishing permitted by any regulation for the conservation of the fishery must apply the same to Indians as to non-Indians. For example, if the prohibition of net fishing is necessary for the preservation of the fishery, it must be equally applied both to Indians and non-Indians in order to come within the ambit of the equal protection clause of the United States Constitution and the "equal protection" implication of article 3 of the Treaty of Medicine Creek.

As previously mentioned, we feel that the juxtaposition of *Puyallup II* beside *Puyallup I* demonstrates that the interpretation of the Treaty of Medicine Creek is an open question. For this reason, we have rendered the decision above as the first phase of our opinion. We recognize that the ultimate disposition of the treaty interpretation question is, however, vested with the United States Supreme Court. Moreover, we feel constrained by the express language on the face of *Puyallup II*, when considered independent of *Puyallup I*, to defer to the statement in *Puyallup II*, recognizing an Indian right to a net fishery. Therefore, pending an ultimate disposition of this issue by the United States Supreme Court, we will follow *Puyallup II* and undertake a consideration of the allocation question expressly called for by that case. We must determine two issues. First, does the Indian treaty right to a net fishery encompass only the natural run of steelhead, or does it extend to both the natural run and the hatchery run? Second, in terms of number of fish, how extensive is the right, and by what agency should this allocation be implemented?

We shall address ourselves to these issues in the above order.

[10] The artificial propagation of steelhead through a hatchery program on the Puyallup River did not commence until 1933. Therefore, just as the inexhaustible supply of fish at the time of the treaty makes it inconceivable that the parties contemplated controls and limits on the fishery, it is also inconceivable that either the tribe or the government intended the treaty to create any rights beyond the natural run. However, by examining the treaty itself, we do find evidence which specifically relates to this issue. Even though the treaty obviously makes no reference to artificially propagated steelhead, which were unknown at the time, it does set forth Indian rights with regard to artificially cultivated shellfish. There is an explicit proviso in article 3 that follows the language securing "the right of taking fish." The proviso states "[t]hat they [the Indians] shall not take shellfish from any beds staked or cultivated by citizens . . ." Treaty of Medicine Creek (10 Stat. 1132-33). This plain language demonstrates that the rights secured to the tribe under the treaty did not encompass artificially propagated sources of fish. Likewise, the Supreme Court indicated in *Puyallup II* that this result is correct. The majority opinion made no comment at all on the issue, but the concurring opinion of Mr. Justice White stated that "the Treaty does not obligate the State of Washington to subsidize the Indian fishery with planted fish paid for by sports fishermen." *Puyallup II* at 49.

We can find no reason to distinguish artifically cultivated shellfish from hatchery bred steelhead since the impact of the treaty is to distinguish natural sources from artificial sources. To interpret the treaty in any other fashion requires this court to literally rewrite the terms of the treaty and this we cannot do. *See Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 91 L. Ed. 823, 67 S. Ct. 650 (1947); *Northwestern Bands of Shoshone Indians v. United States*, *supra*; and *Choctaw Nation of Indians v. United States*, *supra*.

The appellants contend that the opposite result must obtain due to changed circumstances such as civilization and pollution which are claimed to have caused depletion of the natural run. We disagree. The treaty itself does not vest the Indians with any right in hatchery bred steelhead. Furthermore, the record does not demonstrate that the run has been depleted, but instead establishes that the artificially propagated run in fact augments the natural run since a hatchery bred steelhead loses its distinguishing characteristics upon returning to its native stream and henceforth is classified as a natural run steelhead. Mr. Millenbach, the Chief of the Fisheries Management Division, testified as follows:

> Q. Now, does the Department of Game at no cost to the members of the Puyallup Tribe provide any services which enhance the Puyallup Tribe fishery? A. Well, the hatchery planting of smolt steelhead have contributed substantially to the net catch in the Puyallup River—the Indian net catch.

Mr. Heckman, who was called as an expert witness by the appellants and is a fishery biologist in charge of the Northwest Fisheries program, concurred in this opinion. The State thus established that the size of the natural run is increased yearly at no expense to the tribe. On the other hand, the appellants failed to introduce any evidence which substantiated their claim that the size of the natural run has in fact been depleted by the effects of modern society and, if so, the extent thereof. In conclusion, the appellants' contention that changed circumstances justify the sanctioning of a net fishery for hatchery bred steelhead cannot be justified by the treaty and is not supported by the record. Consequently, their argument must fail.

This result, which excludes hatchery bred fish from the treaty right, is further supported by consideration of equity. The evidence below demonstrated that the steelhead program conducted by the State Department of Game is nearly totally funded by the citizens of the state, primarily

via license and other "user fees."[3] It would be manifestly unfair to give one group of citizens a superior opportunity to enjoy a resource thusly provided while denying other citizens, who provide the necessary funding, equal treatment. To allow the Indians to take hatchery fish by the use of nets would be to subsidize them to the extent that other state citizens are paying for the hatchery program, while being limited solely to the much less effective hook-and-line method of fishing.[4] The Indian treaty does not demand such a subsidy. *See Puyallup II* at 49 (White, J. concurring).

We hold therefore that the Puyallup Indians have no rights in the hatchery run of steelhead other than those enjoyed by all citizens of the state. To hold otherwise would be to put the State to a Hobson's choice: either to continue the hatchery program and thus provide the Indians with additional steelhead guaranteed to be caught in their nets; or, to discontinue the program altogether and thus deny the benefits of such a resource program to all citizens of the state. Our holding in no way discriminates against the Indians because they, like all other citizens, are still free, as they always have been, to catch hatchery fish by the hook-and-line method as provided under the regulations of the State Department of Game.

We now direct our attention to the final issue. How many actual fish must be made available for that net fishery, and in what manner should this allocation be implemented?

The trial court decision below was, quite simply, an at-

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[3]The record clearly establishes that approximately 75 percent of the Department of Game's total revenue is derived from license fees. Moreover, only 4 percent of the total statewide expenditures by the Department of Game for the steelhead program are federally derived and this amount is attributable to matching funds under the Federal Anadromous Fish Act. It is our opinion, furthermore, that even if the State Department of Game's programs were totally federally funded, the Indians, absent specific conditions on such federal financing, would enjoy only those rights available to all state citizens to the resources thus provided.

[4]We take judicial notice of the fact that one is far more likely to catch fish through the utilization of a net than with hook and line.

tempt to follow the Supreme Court's mandate in *Puyallup II*. The Supreme Court stated that the harvestable number of steelhead

> must in some manner be *fairly apportion* between Indian net fishing and non-Indian sports fishing so far as that particular species is concerned. . . .
>
> The aim is to accommodate the rights of Indians under the Treaty and the rights of other people.

(Italics ours.) *Puyallup II* at 48-49.

In order to do this, the trial court first determined, as we have, that the Indians' treaty right does not extend to hatchery fish. It then found that the total steelhead run in the Puyallup River is composed of hatchery and natural fish in equal proportions, *i.e.*, half the run is of natural origin and half is of hatchery origin. This finding is amply supported by the record. The record also supports the trial court's finding that a 50 percent escapement factor is required for the propagation of the natural run. Fifty percent of the natural run must be allowed to spawn in order to preserve the species. The trial court thus determined, in effect, that half the total annual steelhead run was natural and that it would be consistent with conservation (escapement) requirements to harvest half of the natural run.

After making the above determinations, the trial court then disposed of the main issue—the ultimate allocation between an Indian net fishery based on the treaty and the sports fishery. Based on equitable factors, the trial court found that giving the Puyallup Treaty Indians 45 percent of the annual, natural steelhead run available for harvest would be a fair apportionment of the resource. Using estimates of the annual natural run size based on evidence relating to past steelhead runs, the trial court translated this percentage share into an exact number of fish, provided that the annual run size continued to be of the same magnitude as the run size estimates before the court.

[11] We believe that 45 percent of the harvestable natural run was an equitable determination by the trial court in the exercise of its discretion. We cannot say from this

record that such a determination was a manifest abuse of discretion. We therefore are not disposed to disturb this holding of the trial court. *See Granite Equip. Leasing Corp. v. Hutton*, 84 Wn.2d 320, 328, 525 P.2d 223 (1974); *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The number of fish resulting from this apportionment will probably vary, of course, from year to year depending on the size of the natural run. The evidence in the record does not clearly establish a constant annual natural run size. On the contrary, the record indicates that the run size varies from year to year. The available estimates ranged from about 4,000 in the natural run to 56,000 in the total run. It is therefore obvious that the effect of this allocation decision will be determined each year by the size of the natural run. Thus it is necessary to decide who should be charged with the duty to make this annual allocation determination.

[12] The Department of Game is the expert state agency charged with the duty to conserve the states' game resources, including the steelhead trout. See RCW 77.12.010, .040. The Supreme Court recognized in *Puyallup II* on page 48, that conservation decisions must be made by an expert. "Only an expert could fairly estimate what degree of net fishing plus fishing by hook and line would allow the escapement of fish necessary for perpetuation of the species."

The 45 percent allocation figure of this decision applies to the harvestable amount of the annual, natural steelhead run, *i.e.*, the amount available after conservation requirements are met. This allocation will necessarily depend on the Department of Game's estimates of the natural run size each year and its annual approximations as to the harvestable number of fish in the natural run. The department's annual determination of the harvestable number of fish in the natural run, that is, its determination of the escapement requirement calculated to assure preservation of the species, will therefore determine the extent of the Indian net fishery required by federal treaty. Forty-five percent of the

harvestable natural run is the extent of this treaty right. The Department of Game's annual determination will actually yield the number of fish that the Indians can catch using nets pursuant to the treaty rights that, for purposes of this part of our opinion, we have assumed to exist.

By thus transforming the Indian right to a net fishery into an actual number of fish, it is possible to recognize this Indian treaty right in light of conservation requirements and in the context of the total annual steelhead run. The total run consists of both hatchery and natural origin steelhead, while the treaty right only applies to the natural fish. It is possible to differentiate the two types of fish by certain markings, but they are substantially identical in size and all other characteristics. In practical terms there is no way to assure that only natural fish will be caught in the Indian nets.

All of the hatchery fish are harvestable because their escapement is not required to preserve the natural run. Thus, if the Indians take annually the actual number of their treaty fish, the rest of the harvestable natural run, plus the rest of the hatchery run, will still be available to the sports fishery.[8] This method allocates the fish available, in light of conservation requirements, between the Indians' net fishery and the sports fishery—it assures that the Indian treaty right is recognized.

To summarize, in phase one of the opinion, we hold that the Puyallup Tribe's right to a net fishery under the Treaty of Medicine Creek has never been directly adjudicated. It is our belief that the treaty language "in common with" does not require that the Indians be exempted from State regulations. Rather, all that the treaty requires is that the regulations apply equally to Indians and non-Indians. Because we feel bound to follow the express language on the

[8]We emphasize again that the sports fishery is available to all state citizens—Indians are not preempted or precluded from participating in the hook-and-line fishery. The record shows that Puyallup Indians have in fact fished in this manner. Indians enjoy the right to sports fishery on an equal basis with other citizens except that they are not required to purchase either a license or a punch card.

face of *Puyallup II*, under phase two of our opinion, we hold that allocating 45 percent of the harvestable natural steelhead run each year to the Indian treaty net fishery is a fair apportionment between Indian net fishing and sports fishing. The Department of Game has the responsibility to determine the extent of the harvestable natural run and to accommodate this apportionment when establishing annual conservation regulations.

The judgment of the trial court is affirmed, except as to the modification thereof, wherein we direct the Department of Game to implement the annual allocation of steelhead consistent with this opinion. The first phase of our opinion is held in abeyance pending a final disposition of the treaty interpretation issue by the United States Supreme Court, at which time a reversal of the trial court decision, consistent with the first phase of this opinion, may be necessary.

HAMILTON and WRIGHT, JJ., concur.

STAFFORD, C.J. (concurring in the result)—I concur in the result reached by the majority as well as with the allocation of the steelhead trout run between the Indians and non-Indians. However, I reach the same result for different reasons.

I have reviewed *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 20 L. Ed. 2d 689, 88 S. Ct. 1725 (1967) (hereinafter called *Puyallup I*) and *Department of Game v. Puyallup Tribe*, 414 U.S. 44, 38 L. Ed. 2d 254, 94 S. Ct. 330 (1973) (hereinafter called *Puyallup II*). The totality of the facts in *Department of Game v. Puyallup Tribe, Inc.*, 70 Wn.2d 245, 422 P.2d 754 (1967) and *Department of Game v. Puyallup Tribe, Inc.*, 80 Wn.2d 561, 497 P.2d 171 (1972) when considered with *Puyallup I* and *Puyallup II* makes several things abundantly clear.

(1) Substantially all of the steelhead trout fishery occurs after their entrance into the Puyallup River; (2) that the case is concerned with the Puyallup Indians' use of setnets to catch steelhead in the Puyallup River; (3) that the only portion of the Puyallup River with which we are concerned

flows through the Puyallup Indian reservation; (4) that the present run of steelhead is made possible by the planting of steelhead; (5) that the planting program is financed in large part by the license fees paid by sports fishermen; and (6) that the central issue is the problem of accommodating the Puyallup Indians' net fishing and the non-Indian sports fishing with the conservation needs of the fishery.

It is equally clear the United States Supreme Court remanded the case for *this state court* to make a fair apportionment between Indian net fishing and non-Indian sports fishing under the above related circumstances. The majority has accomplished this in an equitable manner.

I am convinced the Supreme Court did not direct this court to resolve the apportionment problem as an empty gesture. It is only logical to assume that once a formula resulting in fair distribution was achieved that the fair allocation should, insofar as possible, be maintained. If this assumption is not correct, then much of the language in *Puyallup II* is meaningless.

At first blush it would appear that the State lacks the necessary power to enforce the equitable apportionment directed by the United States Supreme Court. In this regard see such cases as *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 20 L. Ed. 2d 697, 88 S. Ct. 1705 (1968); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L. Ed. 483 (1932); *Kimball v. Callahan*, 493 F.2d 564 (9th Cir. 1974); *Moore v. United States*, 157 F.2d 760 (9th Cir. 1946); *see also Seufert Bros. Co. v. United States*, 249 U.S. 194, 63 L. Ed. 555, 39 S. Ct. 203 (1919); and *United States v. Winans*, 198 U.S. 371, 49 L. Ed. 1089, 25 S. Ct. 662 (1905). On the other hand, it is only logical to assume the Supreme Court is equally aware of the above cited cases and had them in mind when the following broad language was used in *Puyallup II* at page 49:

> The aim is to accommodate the rights of Indians under the Treaty and the rights of other people.
>
> We do not imply that these fishing rights persist down to the very last steelhead in the river. *Rights can be controlled by the need to conserve a species;* and the

> time may come when the life of a steelhead is so precarious in a particular stream that all fishing should be banned until the species regains assurance of survival. *The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets.*

(Italics mine.)

When one considers the fragile nature of the fishery involved, as well as the state's physical and financial support of that resource, it is easy to understand the above quoted language. If the Supreme Court had not recognized the existence of a state power to control and supervise the mandated allocation, the Supreme Court's direction would, for all practical purposes, be impossible to establish, implement, and enforce. Without question the Supreme Court did not intend to direct the State of Washington to perform a useless act.

For this reason, I am willing to accept the above quoted portion of *Puyallup II* at face value and concur in the result reached by the majority.

WRIGHT, UTTER, and HOROWITZ, JJ., concur with STAFFORD, C.J.

ROSELLINI, J. (concurring)—I concur in Justice Hunter's scholarly interpretation of the Medicine Creek Indian Treaty. This interpretation should dispose of the case. However, Justice Hunter felt compelled by the language found in *Department of Game v. Puyallup Tribe*, 414 U.S. 44, 38 L. Ed. 2d 254, 94 S. Ct. 330 (1973), to review the determination of the amount of catchable fish to be apportioned between the commercial Indian net fishery and the hook and line fishery of other citizens.

I believe that any apportionment of the fish run is contrary to the treaty and the Constitutions of the United States and Washington. Apportionment cannot be sustained by the law, or the facts in the case.

I find nothing in the language of the Treaty of Medicine

Creek, 10 Stat. 1132, or in the Treaty of Point Elliott, 12 Stat. 927 (2 *Indian Affairs Laws and Treaties* 669 (1904)), that would even imply that fish runs were to be apportioned between the Indians and the white settlers. In fact, the treaties negate any such interpretation.

The exact language of the treaty incorporated as it was in other similar treaties contemporaneously negotiated with tribes makes it clear that Indians were not to be excluded from fishing at their accustomed grounds, but these rights were to be coextensive only with the citizens of the territory. Thus, the Indians shall have all fishing rights that all the citizens have, and no Indian or non-Indian shall have any superior right.

Any other interpretation would distort the obvious meaning of the language.

Article 3 of the Treaty of Medicine Creek, as noted, says:

> ARTICLE III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, *in common with all citizens of the Territory*, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

(Italics mine.) 10 Stat. 1133.

There is no word in any of the articles or in any other treaty to suggest that either the Indians or the white settlers intended that Indian tribes have a superior right to fish not equally available to citizens of the territory.

The treaty made with the Quinaielt, Quillehute and other tribes, 12 Stat. 971-72 (2 *Indian Affairs Laws and Treaties* 719-20 (1904)), employs identical language to the Treaty of Medicine Creek concerning the right of taking fish in common with all citizens of the territory.

The Treaty of Point Elliott, 12 Stat. 927, 928, with the Dwamish, Suquamish, and other tribes employs the same

language used in the Treaty of Medicine Creek and the treaty with the Quinaielt and Quillehute:

> ARTICLE V. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. Provided, however, that they shall not take shell-fish from any beds staked or cultivated by citizens.

None of these treaties contains a hint that the Indians would acquire fishing rights superior to the citizens of the territory, or that the Indians would have a property right to 45 percent of the fish runs or any fraction of any fish run. The treaty gave the Indians and settlers a right to be held in common—the privilege or opportunity of catching fish.

Similarly, in the Treaty of Point No Point, 12 Stat. 933, 934, article 4 declares that

> [t]he right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States; . . .

It will be noted that there is a minor departure from the language of the three other treaties in describing the settlers as citizens of the United States rather than as citizens of the territory. One cannot find from this treaty or the three other treaties any language which gives exclusive off-reservation fishing rights or any apportionment of the fish runs.

What the treaties said is that Indians should not be barred from an opportunity to fish any more than the settlers were denied the right to do so.

A treaty signed in June 1855 in Walla-Walla Valley between the United States and the Walla-Walla Tribe, 12 Stat. 945, 946, illustrates that the Indians and United States were capable of using explicit language when it was desired to give exclusive rights to Indians to fish. Article 1 of the treaty says

> [t]hat the exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said Indians, and at all other usual and accustomed stations in common with citizens of the United States, and of erecting suitable buildings for curing the same; the privilege of hunting, gathering roots and berries and pasturing their stock on unclaimed lands in common with citizens, is also secured to them.

It can be seen that in the Walla-Walla Treaty, the Indians reserved the exclusive right to take fish from streams running through and bordering said reservation and outside their reservation in common with the citizens of the United States. There was no difficulty in selecting the words to convey the separate ideas of "exclusive rights" and "rights secured in common" with the citizens of the United States.

The precise distinction between exclusive and shared rights held in common with the citizens of the territory were made in a treaty with the Yakima Indian Tribe. (*See* 12 Stat. 951.)

A reading of all the treaties which were signed at about the time of the Medicine Creek Treaty in 1854 makes it clear that where an exclusive right was intended, and when a right to fish in common with the settlers or citizens was intended, language was used precisely to express the idea of exclusive rights and nonexclusive rights.

If it was intended to give 45 percent or any other portion of the fish runs to Indian or white citizens, language could have been used to express that intent. I find not even a hint that this was the intent of the treaties. I am sure that a treaty which would have given away any percentage of the fish runs would not have been ratified.

It must be remembered that the United States was inhabited by persons who left their homeland because of religious or political discrimination. They left also because of the economic discrimination. It must be remembered that game belonged to the King and to the estates of the lords. No one could hunt or fish without the consent of the King or the lords. In fact, poaching was a crime punishable

by imprisonment or death. Thus, it would have been inconceivable that the citizens or settlers of the United States would have allocation of fish or game.

In any event, article 6 of the United States Constitution reads:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land;
> . . .

It will be seen that the United States Constitution, the laws made pursuant thereto, and the treaties are the supreme law. The laws enacted must pass the test of constitutionality. The treaties which are passed may not violate the constitution and may not deprive the citizen of any of his constitutional rights.

Treaties are part of the domestic law and where, as in this case, both parties to the treaties are citizens of the United States, the provisions of the constitution apply. Otherwise, the Executive and the Senate could by treaty which involves rights of its citizens disenfranchise a class of citizens. Any treaty right that gives Indians superior rights denies the equal protection of other "citizens" rights.

Let me further state why I think an apportionment of the fish run is legally incorrect.

It must be remembered that the steelhead fishery is financed by the purchase of fishing licenses and steelhead tags by the fishermen. None of the taxpayers' money is used for hatchery planting programs in restocking the rivers, except a very small amount furnished by the federal government.

Without the hatchery-reared steelhead planted in the rivers, there would not be any fish to catch and there would not be a natural run. My conclusions are based upon the following facts which logically follow from the planting statistics, and take into account the misconception of what is natural and what is native steelhead.

The record disclosed that natural or native steelhead is

arbitrarily defined as any steelhead that does not have any hatchery marking. The record disclosed that the progeny of the hatchery-planted steelhead under this definition is arbitrarily counted as a natural run of steelhead.

The following chart which sets forth the planting and catch of steelhead illustrates to my mind that without the large planting, the return of the steelhead would be minimal.

PUYALLUP RIVER SYSTEM STEELHEAD PLANTS AND CATCH

Winter Season	Cycle Plant[1]	Indian[2]	Sports	Total
1947-48			1,937	1,937
49			4,644	4,644
50	52,000		7,443	7,443
51	18,000		6,037	6,037
52	33,000		15,660	15,660
53	66,000	104	14,566	15,670
54	74,000	2,671	19,296	21,967
55	70,000	2,029	14,490	16,519
56	47,000	2,308	20,348	22,656
57	70,000	2,554	14,184	16,738
58	57,000	2,960	8,794	11,754
59	53,000	2,740	7,528	10,268
60	55,000	4,506	9,547	13,053
61	63,000	2,917	4,684	7,601
62	79,000	2,629	10,419	13,048
63	57,000	1,834	11,717	13,551
64	65,000		15,942	15,942
65	63,000		6,914	6,914
66	93,000		18,761	18,761
67	65,000		15,971	15,971
68	100,000		16,971	16,971
69	67,000		11,602	11,602
70	98,000	500	6,738	7,238
71	124,000	1,500	12,101	13,601
72	123,000		9,648	9,648
73	122,000	317	4,015	4,332
74	107,000	1,105[2,500-3,000][3]	[4,472]	
75	75,000			
76	68,000			

[1]Cycle plants made 2 years prior to winter season, i.e., cycle plant of 52,000 (1950) was made in 1948 and contributed to the catch of 7,443 fish in 1949-50 winter season.

[2]Data represents White River and Puyallup Indian catch as available and is incomplete.

[3]The numbers appearing in brackets are not part of the exhibit.

Respondent's Brief, Appendix; Exhibit 74-2.

Without the massive infusion of the hatchery fish, the steelhead runs subject to the net fishery would have been depleted.

The evil of permitting net fishing for steelhead is that it will devastate the run. The net fishery on the Skagit River exceeds 57 nets. Many of the nets are placed alternatively from one side of the river to the center of the river. The nets on the opposite side are placed alternatively so that they intersect the nets placed on the other side of the river. The effect is to block all upstream fish.

Steelhead are different from salmon, which spawn and die. Steelhead will spawn and live to return to spawn again. They are in a very poor condition after spawning and are regarded as unfit to eat. The nets not only take all the steelhead going upstream to spawn, but will catch all the steelhead which have already spawned and are returning downstream.

Runs of steelhead enter rivers at different times during the season. It is possible to deplete the run at a certain period. It is urged that proper regulation can control this situation; however, the record is replete with evidence that net fishery cannot be successfully regulated.

The inefficiency of the enforcement of the regulation is shown by the fact that in December 1975, the Indians caught 2,476 fish on the Puyallup River, while 1,341 sportsmen fishing by line and hook caught only 102. In Western Washington Green River, 12,000 non-Indians caught only 50 fish, while Indian netters took 4,839. On the Skagit River, 893 sportsmen caught 89 fish while the Indians netted 2,367 fish.

Conservation means the wise use of the resource, and in the management of steelhead there must be necessary escapement for needed spawning to insure the perpetuation of the resource.

The manner of fishing must be such that it can be controlled so it does not impair or damage the necessary escapement; and, further, the manner of fishing itself must not be destructive. The Department of Game, in order to con-

serve the steelhead runs, has placed limitations on the manner of fishing and the catch limit of steelhead. Non-Indians must fish with line and hook (as opposed to the Indian net fishing), and the non-Indian is limited to the maximum of 2 per day and no more than 4 in possession, and a maximum of 30 per season.

This case is entitled "Department of Game v. Puyallup Tribe, Inc." It suggests that the tribe itself is benefiting from the net fishery. However, the record shows that there are approximately 850 members of the Puyallup Tribe, of which 320 are over the age of 21. *Twenty* Puyallup Tribe fishermen fish essentially full time, 20 part-time, and an additional 20 fish only occasionally. The commercial value of steelhead caught by the Indians is approximately $10 a fish. The individual fishermen keep the proceeds of their fish sales, and this money is not shared with the tribe.

How can an apportionment of the catch, as found by the court, of 45 percent of the fish runs be equitable, fair, or conscionable when 60 Indians are allocated such a large proportion and thousands of non-Indians must share the remainder?

Under the Treaty of Medicine Creek, the only guaranty to the Indians is a right to the opportunity to fish. The treaty did not guarantee them any portion of the fish. Even if apportionment is permitted, should not the fish be divided more equitably between the non-Indian sportsmen and the Indians?

It must be remembered that before the incredible doctrine of apportionment was announced, the Indians had the same right to fish, and in the same manner as non-Indians. The treaty Indians could fish as sportsmen or as commercial fishermen, whether it was by troller, gillnetting, or setnet.

Heretofore, all citizens, whether Indians or non-Indians, were treated as equals. Now the courts have decided the rights of other citizens are inferior to Indian rights. I cannot subscribe to such a doctrine. I would hold that the treaty does not permit or contemplate any allocation of the

fish, but rather the opportunity to fish and catch fish in the same manner as any citizen. I would take cognizance of the fact that fishing with fixed nets will devastate the fish runs and jeopardize one of the great natural resources of this state—a result which could never have been intended by any party to these treaties.

BRACHTENBACH, J., concurs with ROSELLINI, J.

[No. 43750. En Banc. April 8, 1976.]

MICHAEL E. LINDSAY, ET AL, *Plaintiffs*, WESLEY BRABANT, *Appellant*, v. THE CITY OF SEATTLE, ET AL, *Respondents*.

[1] Civil Rights—Public Employment—Discrimination—Determination. A court may determine whether public employment practices violate the equal protection rights of minority applicants by applying the test imposed by title 7 of the Civil Rights Act of 1964, i.e., whether they deprive or tend to deprive such persons of employment opportunities or adversely affect their status as employees on the basis of race or national origin. Discrimination may be inferred from statistics which demonstrate a substantially disproportionate level of minority representation in public employment.

[2] Civil Rights—Affirmative Action—Necessity—Public Employment. Title 7 of the Civil Rights Act of 1964 mandates an affirmative action program for persons of minority background in public employment when necessary to eliminate the continuing effects of past discrimination, whether or not current practices are discriminatory. The need and justification for affirmative action are eliminated when minority representation in public employment fairly approximates minority representation in the population of the area; statistical perfection is not required.

[3] Civil Service—Discrimination—Federal Supremacy—Local Laws. Under the supremacy clause (U.S. Const. art. 6, cl. 2), federal legislation relating to discrimination in public employment is controlling over conflicting state or local enactments relating to selection of public employees.

[4] Appeal and Error—Review—Issues Not Raised in Trial Court—In General. An appellate court will not pass upon issues which were not presented to the trial court.

[5] **Administrative Law and Procedure—Delegation of Powers—Constitutional Requisites.** A delegation of legislative power is constitutionally permissible when it provides standards which indicate what is to be done and the administrative body which is to do it, and there are procedural safeguards against arbitrary administrative action and abuse of discretionary power.

[6] **Civil Rights—Affirmative Action—Public Employment—Use of Goals—Validity.** The use of goals in implementing an affirmative action program in public employment is constitutionally permissible. A goal, unlike an absolute quota or preference, is a realistic numerical objective which is based on expected job vacancies and qualified applicants available and which does not require displacement of existing employees, creation of unneeded positions, or the hiring of unqualified persons.

[7] **Administrative Law and Procedure—Administrative Rules—Validity—Determination.** Rules adopted by an administrative agency pursuant to a specific legislative delegation of such authority are presumed to be valid; a person who asserts their invalidity has the burden of proving that the agency abused its discretion in adopting the rules in question.

Appeal from a judgment of the Superior Court for King County, No. 757364, Solie M. Ringold, J., entered October 5, 1973. *Affirmed.*

Action challenging a civil service affirmative action program. One of the plaintiffs appeals from a summary judgment in favor of the defendants.

C. R. Lonergan, Jr. (of *Siderius, Lonergan & Crowley*), for appellant.

John P. Harris, Corporation Counsel, and *Gordon F. Crandall, Assistant*, for respondents City of Seattle, et al.

James E. Fearn, Jr., and *Peter Greenfield* of *Legal Services Center* (Seattle), for respondents Green, et al.

This opinion was prepared by the late Justice Robert C. Finley. It is adopted by the undersigned Justices as the opinion of this Court.

The central issue raised in this case is whether the City of Seattle may adopt a system or program for the employment of civil service workers that gives special employ-